1969

H. Delmar White And Norma L. White, His Wife v. Weber Basin Water Conservancy District : Brief of Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

H. DELMAR WHITE and NORMA L. WHITE, his wife,
Plaintiffs and Appellants,

vs.

WEBER BASIN WATER CONSERVANCY DISTRICT,
Defendant and Respondent.

Case No. 11474

BRIEF OF APPELLANTS

Appeal from Order Setting Aside Jury Verdict and Judgment Thereon
Second District Court, Weber County
Honorable John F. Wahlquist, Presiding

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NATURE OF THE CASE

This is an inverse condemnation action brought by plaintiffs against defendant for the purpose of securing damages to their real properties caused by interference with the underground flow of natural waters which previously coursed beneath the surface of their lands. Specifically, they contend that the construction and operation of the large Willard Pump Canal, a feature

of the Weber Basin Project, has so disrupted the previously existing underground water flow in the area as to render their farm lands, which are located in Weber County, virtually worthless due to intermittent raising and lowering of the water table. The net effect of this condition has been to cause periodic soaking of the land and the raising to the surface of lower-level alkali materials.

DISPOSITION IN LOWER COURT

Pursuant to the Pre-Trial Order the issue of the dollar amount of damages to plaintiffs' properties was withheld for subsequent consideration, depending upon the outcome of the portion of the case actually tried. Except as indicated, all other pertinent issues were tried before Hon. John F. Wahlquist, District Judge, sitting with a jury.

The necessary issues to be determined were submitted to the jury in the form of special interrogatories. The jury returned with its verdict of "Yes" to all three interrogatories submitted to it, thus ruling in favor of plaintiffs on all issues submitted. Subsequently, defendant filed a Motion to Set Aside Verdict (R. 18), and the Judge granted defendant's Moton.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek to have the jury verdict re-instated and to have judgment consistent therewith. They con-

tend that the verdict should stand and that the matter should hereafter proceed to further trial on the matter of damages.

STATEMENT OF FACTS

In 1962 plaintiffs acquired 35 acres of unimproved dry land properties in the area of Farr West, Weber County. The land was located a short distance west of Highway 84 and south of the Plain City road. The land was purchased from one, Riley Taylor (Tr. 17), who had just previously in 1961, sold off a small strip along the east side of the property (Exh. C) for the purpose of furnishing some of the land needed for construction of the Willard Pump Canal (Tr. 20). The Willard Pump Canal is a connecting waterway between the Slaterville Diversion Dam on the Weber River (located west of Ogden City) and the Willard Bay Reservoir (located in the vicinity of the Weber-Box Elder County lines). The canal is so designed that flood and other waters from the Weber River will flow by gravity to the Willard Reservoir; then, during the irrigation season, the waters from the reservoir are pumped back in a reverse direction to the Weber River system. From the Slaterville Diversion Dam the waters can then be distributed into western portions of Weber County.

Inasmuch as the lands which plaintiff purchased did not have a water right, they began dry farming the properties by planting a crop in the fall of 1962

and then harvesting the crop the following year (Tr. 21). The 1963 barley crop, which was planted in the fall of 1962, produced a yield of 63 bushels per acre; the 1964 barley crop, which was planted in the fall of 1963, yielded 90 bushels per acre (Tr. 24). Neither crop was irrigated and reliance was placed upon natural rainfall.

During August, 1964, shortly after the large canal had been constructed and water had been put it it for the first time, plaintiffs first noticed the existence of wet spots in their previously arid farm (Tr. 21). This occurred when the combine which was harvesting grain got stuck in one or two places. Thereafter, during the fall of 1964 another barley crop was planted. The entire farm was covered with a lush growth of green healthy barley as can be seen on Exhibits A-1 and A-2.

With the arrival of spring in 1965 plaintiffs were astonished to find water over most of their farm lands in the form of scattered surface ponds. This condition continued into May or June of 1965 (Tr. 25-27) and killed the entire barley crop (Exh. A-3, A-4 and A-5). The net yield from the crop in 1965 was slightly over 2 bushel per acre (Tr. 27). Plaintiffs have been unable to harvest any crop from the land during subsequent years up to the present time (Tr. 34).

In addition to the intermittent raising of the water table to the surface of the ground there has been created a worsened condition in that underground accumulations of alkali started rising to the surface area in June,

1965 (Tr. 62), thereby making it impossible for seed to sprout and necessitating ultimate construction of an expensive underground drainage system in order to remove the alkali accumulations (Tr. 34-35).

In the operation of the Willard Pump Canal there are substantail periods of time when the canal is filled with water; at other times the canal is dry and does not carry project water. In observing the raising and lowering of the water table on their lands, plaintiffs first suspected that the canal was leaking since the raising of the water table seemed to coincide with times when the canal was substantially full of water, and the lowering of the water table on their lands occurred when the canal was empty (Tr. 28, 35, 67). Plaintiff's original suspicions were somewhat fortified when their examination of the canal bank revealed moist spots along the exposed portions of the canal bank (Exh. A-8 and A-9).

At this point it should be noted that the Willard Pump Canal is a very large water-way capable of carrying several hundred cubic feet of water per second. The canal is so constructed that its bottom, or base, is a considerable distance below the ground level of the surrounding area; similarly, the top of the sides of the canal is considerably above the level of the surrounding ground area. Thus, when the canal is full of water, the water level is well above the level of the surrounding farm land.

Plaintiffs mentioned their problem to representatives of the Weber Basin Water Conservancy District

and the U. S. Bureau of Reclamation during the fall of 1964 or the spring of 1965 (Tr. 236), but they were assured that the canal was not leaking. It was sometime during the summer of 1965 that plaintiffs became convinced that the water condition in their lands was actually not due to canal leakage as they had first conjectured. It was quite by accident that they discovered that built-in features of the canal system and the manner of its construction were the direct and proximate cause (Am. Comp.—R. 7, 8) of their lands occasionally becoming soggy and wet (R. 2).

Without going into detail at this point, suffice it to say that their discovery of the cause of the problem was related to a small flowing well which they drilled a short distance west of the Willard Pump Canal in the summer of 1965 so as to get livestock water. At a depth of approximately 6 feet the well driller encountered a "hardpan" condition, consisting of tightly compressed clay material of a thickness of approximately 10 inches (Tr. 29-30). The well driller encountered a great amount of trouble in drilling through this short distance of "hardpan," but as soon as the small 2 inch diameter hole had been placed through it the water pressure from below pushed the water lying under the "hardpan" up to the top of the hole. Remembering that the construction of the canal along the east side of his property was exceedingly difficult due to having to break through the "hardpan" strata which was found at intervals throughout the area, Mr. White determined that the breaking of the "hardpan" areas

along the east side of his farm during the canal construction, coupled with alterations in the previously existing underground water flow by the deep canal system, were directly related to his water problem.

Investigation in the neighborhood on the opposite, or east, side of the canal revealed similar water problems concerning lands of his neighbors (Tr. 72-73, 100). After discussions with representatives of the defendant and Bureau of Reclamation officials produced unsatisfactory answers and no hope of a solution to the problem, this action was commenced against the Weber Basin Water Conservancy District as the real party in interest.

As prevously indicated, all of the pertinent issues other than the amount of monetary damages sustained by plaintiffs' properties, were submitted to the jury, which made the following answers (R. 17):

"FIRST INTERROGATORY:

Do you find it proven by a preponderance of the evidence that the Weber Basin Water Conservancy District is a real party in interest in this proceeding?

Answer: Yes....X.... No.....

If you answer interrogatory number one "no" return to the court room as you will have disposed of the case.

SECOND INTERROGATORY

Do you find it proven by a preponderance of the evidence that the construction of the canal

in the manner in which it was constructed has in fact caused the water level on the plaintiffs' land to be raised to a point where substantial damages have accrued to them?

Answer: Yes....X.... No.....

If you have answered interrogatory number two "yes" then you are to answer interrogatory number three.

THIRD INTERROGATORY:

Do you find it proven by a preponderance of the evidence that at the time the deed was granted by the Taylors for the release of their lands for the construction of the canal in question that the damages which you have found in interrogatory number two were of such a gross nature or of a different nature than any contemplated or foreseeable so that it can be fairly said that the bargain reached between the Taylors and those they dealt with did not include a contemplation of a risk of this type being accepted in ownership of the land as it continues?

Answer: Yes....X.... No.....

Dated this 18th day of November 1968

s/d Frank D. Lindsay
FOREMAN"

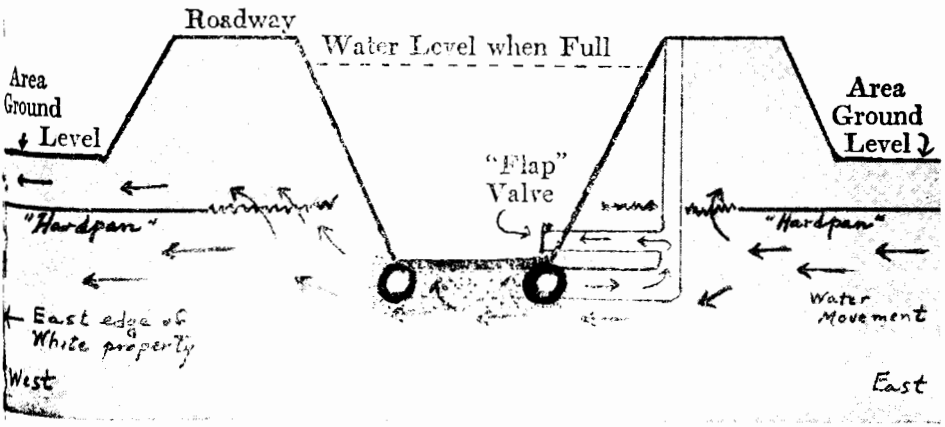
It is submitted that the evidence in this matter clearly substantiates the verdict of the jury and that the Court improperly granted defendant's Motion to Set Aside Verdict.

ARGUMENT

I.

THE MANNER OF CONSTRUCTION AND NORMAL OPERATION OF THE CANAL SYSTEM HAS CAUSED DAMAGES TO PLAINTIFFS' LANDS BY REASON OF CREATING FLUCTUATING UNDERGROUND WATER LEVELS.

In determining whether the jury's findings in plaintiffs' favor on the issue of whether or not the damage to their lands was caused by fluctuating water tables created by the original construction and subsequent normal operation of the canal system, it is necessary that a clear understanding be had as to what was initially done in the construction process and how the canal system in operation affects the underground water table in the area of plaintiffs' lands. Acordingly, the accompanying diagram has been prepared to illustrate as simply as possible the facts developed at the trial.



CANAL CROSS SECTION

Several witnesses explained that the new Willard Pump Canal penetrated considerably deeper into the ground area than did the much smaller local Plain City Canal which previously served several farmers in the area and which ran along the same general route (Tr. 68, 231). Mr. White observed that during construction the contractor had considerable trouble along the east side of his property breaking through the "hardpan" with his equipment so as to secure necessary canal depth, and that upon getting below the "hardpan" the amount of water encountered necessitated the utilization of 3 large diesel pumps in order to remove accumulating water (Tr. 31, 36). In fact, areas of "hardpan" which were encountered in the area required that the large crawler tractors break the material with "grub hoes", or rippers, and the utilization of diamond point prongs on the buckets (Tr. 32, 36). Mr. Clyde Hancock, a 20-year resident of the area and a former Bureau of Reclamation employee who worked in the area as a soil driller prior to construction of the canal (Tr. 87), stated that his work located the "hardpan" condition in the general area east of the White property and extending westerly across a substantial portion of it (Tr. 89, 90). He also explained that his investigation revealed that the water pressure was generally held beneath the "hardpan" until it was broken (Tr. 91), and that the contractor building the canal was required to use "scaff" iron teeth on the buckets of his equipment in order to break through this hard material (Tr. 91, 94). In fact, the pounding of the dragline bucket during construction

in the area kept local residents awake during the night shift (Tr. 115).

Mr. Wayne J. Eldredge, an engineer employed by the Bureau of Reclamation, admitted on cross-examination that the "hardpan"—which he referred to as "cemented sand"—was encountered at various places east of and contiguous to the White property (Tr. 174). Mr. Eldredge further pointed out that the original plans for the construction of the canal through the area were modified because of the high bids received as a result of the underground water problem. Later, after the first group of bids were rejected, the plans for the canal was modified so as to cope with the water problem which was present (Tr. 180).

If we now refer to the canal cross-section diagram we see that the water level of the canal when full is considerably above that of the surrounding grand level. Similarly, the bottom of the canal is considerably below the surrounding ground level, and it has been placed well down intothe area where the normal underground water movement occurs. Mr. Eldredge testified that the underground water in the area moved in a generally east to westerly direction (Tr. 193) to the White properties. He further expressed his opinion that the underground water coming through the White properties was an uneven movement of underground water (Tr. 194).

Mr. Eldredge explained that at such times as the canal would not be in use, there was the possibility that

the banks of the canal would collapse from the surrounding under-ground water pressure unless a means was provided whereby the underground pressure was relieved. In order to accomplish this task there were placed two parallel pipes running along the bottom of, and beneath, the canal. These pipes were inter-connected, and they were laid in a gravel base so as to permit the passage of water freely between and into the parallel pipe systems. Connected to the underground parallel pipe system was another pipe which returned into the bottom of the canal system, and inserted in this latter pipe was a little device known as a "flap" valve.

The "flap" valve, which operated on a hinge or similar device across the pipe which discharged water into the canal, was so constructed that it operated automatically since it was actuated by the water pressures involved. Specifically, when the canal was full of water there was sufficient pressure in the canal to press the "flap" valve shut, thereby preventing any canal water from discharging into the surrounding underground area; conversely, when the canal was empty the pressure from the underground water which was collected through the parallel drain pipe system pressed against the flap valve and forced it open. The net result was that the empty canal would have a stream of water running into it and on northerly to the Willard Bay Reservoir as the surrounding land areas along the canal discharged the underground water into the canal through this system.

On analyzing the method utilized one can readily see that the lowering of the surrounding underground water level by the utilization of this drain system and the automatic opening of the "flap" valve provided protection against any collapsing of the lower banks of the canal due to underground water pressure. This simple system thereby relieved the operator of the canal from having to have water in it at all times to prevent such a collapse (Tr. 201).

On cross-examining Mr. Eldredge concerning this particular method of protecting the canal, he gave answer to the following question (Tr. 203):

MR. FULLER: This would appear to be an ingenious device?

A. It is quite an engineering feat, I'll admit.

It is obvious that whenever the canal is emptied—as it has been at several times since its construction—the effect of this automatic system will lower the ground water table in the general area below that which normally existed before the construction of the canal. Mr. Eldredge admitted that the workings of the canal would definitely affect the water table in the area (Tr. 203):

Q. You will admit that it does affect the underground flow of water in the area when it opens to some degree?

A. Well, it affects it when the canal is empty. It will have an influence temporarily until we bring the water back up.

Although the Bureau of Reclamation engineers refused to acknowledge that there was a possibility that the ground water table would rise above that which previously existed in the area, certain pertinent additional facts were developed which would definitely support a finding that underground water could at times rise much nearer to the surface in certain areas than had been the case previously. One of the important facts developed upon cross-examination of Mr. Eldredge was that the underground pipe system installed beneath the canal was a "closed circuit" system (Tr. 178):

Q. Now, my next question is, are these underground drains so fixed that under normal conditions the water under the canal would be discharged out into the countryside into an existing drain and thereby run off, (or) is this a closed system?

A. No, the only way that water can get out of the under (ground) drain is through the flat (flap) valves into the manholes.

Q. Into the canal?

A. Into the canal.

* * * *

Q. So that I am correct in this, am I not, that the underground drain system is an exclusive feature designed for the canal itself?

A. They are for the protection of the canal, yes.

A. And, they are not designed to drain the surrounding land?

A. No.

Q. Now, these drains were initially put in at about 8 to 9 feet below ground level?

A. Yes, they were put in outside of the lining near the bottom of the canal.

Mr. Eldredge explained that the canal along the east side of the White property lay almost flat, with only a very slight grade to the north toward the Willard Bay Reservoir (Tr. 192). Also, he explained that the drain system beneath the canal was also practically level. In addition, Mr. Eldredge pointed out that the underground drain system was blocked at the north end of the White property (Tr. 191) and blocked at a point near the south end of the White property (Tr. 192).

The important significance of the "closed circuit" underground drain system is that, in addition to protecting the canal by draining into it the underground water in the surrounding area when empty, the underground water which normally courses through the area when the canal is full is *re-distributed pressure-wise evenly along the entire east side of the White property.* Conceding, as the engineers contended in testimony on behalf of the defendant, that the underground water coursed in its original state in various streams through the property and that the "hardpan" areas were interspersed through the area, the effect of the underground drain system when not operating so as to discharge underground waters into the canal is to re-distribute

the water pressure and thereby permit the water so accumulated to pass beneath the bottom of the canal *and to rise in areas where the water could most easily escape!*

MR. FULLER. Insofar as acting as it did before the canal existed, am I not right in this, that prior to the building of this canal this water came through in various strata across where the canal was?

A. Yes.

Q. In uneven amounts?

A. (Nodding his head up and down).

Q. And you have now built the uniform system of what, 2,000 feet more or less where all of the waters are connected in a solid pipe system?

A. Well, if you include on both sides, there is 2,000 feet, probably 1,000 feet in length, two drains.

* * * *

Q. So as the water on the east side, as it flows generally westerly or at some angle, it hits the canal and either has to spread out and back up or go down and under the canal. Right?

A. Well, we are still, I assume we are talking about the sub-surface water and not surface water?

Q. Yes. Sub-surface water.

A. There is no way that sub-surface water can go across the canal except through these drains.

Q. And if it gets across the canal, could we say that we are reasonably sure that it would not pick up the old channel that it once followed before the canal was built, would that be a fair assumption?

A. Well, I wouldn't know on what channels they would follow.

* * * *

Q. What would be your general thinking that if it did go under the canal that it would or would not likely pick up the old channels of water?

A. If it goes under the canal it is going to find a pervious strata down here and it is going to follow that pervious strata.

Q. Right.

A. As far west as it can go.

Q. And that will be the course of least resistance?

A. Yes.

Q. And that may or may not be where it used to flow?

A. That is true.

Q. And then when the canal is emptied again, whenever that might be, then immediately this pipe system will suck out the water from the remaining ground up to where it finds its own level and run it down the canal.

A .It is not going to drain the ground water below the existing drains.

Q. Right. (Tr. 199-201)

In view of the fact that the hardpan area on both sides of the canal was broken during the course of construction, it certainly would not appear unusual in the slightest degree that the re-distribution of the water pressure along the east side of White property could easily come up past some hardpan layers and get above the previously existing ground water level. Certainly, there is not the slightest question but that the underground water table in the area is affected whenever the canal is emptied and that, if nothing more, the surging and re-surging of the ground water table from time to time would in and of itself be adequate to dislodge the previously existing alkaline strata so as to cause the alkali minerals to permeate all of the White properties even if the maximum heights of the water table were only occasionally raised.

Plaintiffs do not contend that the canal or its operation have created more ground water in the area; rather, it is the alteration of the pattern of underground flow caused by the original construction and the normal workings of the canal which have created the problem here involved. Similarily, plaintiffs do not contend that their difficulties have arisen by reason of any negligent or tortious activities related to the operation of the canal—their difficulties have been occasioned simply by reason of the basic nature of the project and its normal opertaion. In short, this is a case in inverse condemnation.

Inverse condemnation cases in other jurisdictions

have involved facts similar to those here presented. In most inverse condemnation cases involving flooding, the water has been found to have originated in the canal and to have escaped by overflow or seepage. Fewer cases, as in the base at bar, involve flooding by natural subsurface waters which have been unable to drain along natural underground channels because of alterations brought about by construction activity. Two cases in this latter category are *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 70 S. Ct. 885, 94 L.Ed. 1277 (1950), and *Nelson v. Wilson,* 239 Minn. 164, 58 N. W. 2d 330 (1953).

In the *Kansas City Life* case the respondent owned 1,710 acres situated one and one-half miles from the Mississippi River on Dardenne Creek, a non-navigable tributary to the Mississippi. The land ranged in elevation from 422.7 feet to 422 feet. To provide a navigable channel on the Mississippi River, the United States constructed a lock near the mouth of Dardenne Creek. This lock was designed to raise the level of the Mississippi River to 420.4 feet, the river's previously ascertained ordinary high-water mark. The ultimate operation of the lock destroyed the agricultural value of respondent's lands by underflowing. It was found that the underground water level upon respondent's land was raised by (1) percolation of water and (2) by resulting blockade of the drainage of the land's surface and subsurface water.

The United States Supreme Court held the flood-

ing to be a taking to the extent of the destruction caused. On page 1285 of the Lawyer's Edition, the Court stated:

> "The findings in the instant case show that the land was permanently invaded by the percolation of the water from both the river and its tributary. The percolation raised the water table and soaked the land sufficiently to destroy its agricultural value. The continuous presence of this raised water table also blocked the drainage of the surface and subsurface water in a manner which helped to destroy the productivity of the land. Whether the prevention of the use of the land for agricultural puposes was due to its invasion by water from above or from below, it was equally effective . . ."

A similar situation was presented in *Nelson v. Wilson*, 239 Minn. 164, 58 N. W. 2d 330, 333 (1953). There water was impounded in 1940 to create an area for propagation of fish. Condemnation proceeding instituted in 1936 set the water level at 102 feet. Plaintiffs' predecessors in title were not parties to the 1936 condemnation. In fact, the plaintiffs owned land upstream from the dam and reservoir. From 1940 to 1948 general flooding conditions prevailed and land which was initally dry had grown to cattails and bullrushes. Only a small portion of the land could be used for pasture or hay. It was found that the flooding was caused by (1) high water t able preventing seepage of natural water into the subsoil and (2) by backing of water behind the dam. Flooding occurred up to elevation

104, although much of the land upstream from the dam and reservoir was below elevation 102.

The Minnesota Supreme Court stated that it had again and again held the overflowing of land by backing water to be a taking. The Court also saw a taking through underflowing or percolation.

> " . . . Unquestionably, land may be taken not only to the extent of the actual flooding but also to the additional extent that the flooding water by percolation raises the water table so as to soak the land to a degree and for a sufficient duration to destroy its agricultural value and it is immaterial whether the destructive effects of such percolation result from an invasion of water from without or by a blocking of the normal drainage of surface and subsurface waters . . . "

Sections 6.1 (1) and 6.23 (3) of Nichols on Eminent Domain, Vol. 2, make it abundantly clear that a constitutional taking of real property occurs where the land is permanently flooded so as to limit its use.

> " . . . Any limitations on the free use and enjoyment of property constitutes a taking of property within the meaning of the constitutional provision. It is sufficient that the person claiming compensation has some right or privilege in the appropriated property, which right or privilege is destroyed, injured, or abridged by such appropriation."
>
> 2 Nichols on Eminent Domain, Sec. 6.1 (1)

Nichols on Eminent Domain was cited with approval by this Court in the case of *Board of Education*

of Logan City School District v. Croft, 13 Utah 2d 310, 373 P. 2d 967, 699 (1962). In that case this Court stated that damage under subsection (3) of Utah Code Annotated, 1953, Section 78-34-10, required

> " . . . a definite physical injury cognizable to the senses with a perceptible effect on the present market value: such as drying up wells and springs, destroying lateral supports, *preventing surface waters from running off adjacent lands or running surface waters onto adjacent lands,* . . . " (Italics added).

In anticipation of a portion of defendant's case, wherein it may be claimed that the White property was previously subjected to an alkaline condition, plaintiffs would refer the Court once again to the lush green cover of grain on the properties in the fall of 1964 as shown on exhibits A-1 and A-2. Also to be noted is the admission by all of the witnesses to the effect that, before the Whites planted the area to dry farm barley, there were considerable areas of sagebrush and foxtail grass. Although the witnesses generally agreed that sagebrush did not grow well in alkali soils, Mr. Greenhalgh—a Bureau of Reclamation engineer who testified for defendant that the land had alkalai areas in its former condition—contended that foxtail grass grew in alkali soils (Tr. 152). He was forced, however, to back-track his testimony when he was confronted with Exhibit F, a United States Department of Agricultural Bulletin, which by way of illustration and explanation pointed out that foxtail had a "poor salt tolerance".

In addition to the foregoing defense it is also anticipated that the defendant will refer to other evidence which it introduced in an abortive attempt to show that the water table on plaintiffs' properties had not actually ever risen to the surface as contended by them. This evidence consisted of readings in a series of pipes along the north line of plaintiffs' properties, which showed that the water table had seldom risen above a level of approximately 4 feet below ground level. However, it was pointed out that all of the test holes were located not more than 50 feet distance from a parallel deep open drain (Tr. 228-230) which effectively held the water table to that maximum height (Tr. 254) at that particular location only.

In view of the foregoing it is submitted that the jury had ample evidence in finding that the canal construction and its operation so affected the water table in plaintiffs' properties as to create the damage which has been sustained. The Court unjustifiedly reversed the jury's verdict in this respect.

II.

THE ACQUISITION SETTLEMENT INVOLVING PLAINTIFFS' PREDECESSORS COULD NOT HAVE REASONABLY FORESEEN OR ANTICIPATED THE TYPE OF DAMAGE TO THE SUBJECT LANDS WHICH HAS ACTUALLY OCCURRED.

Plaintiffs submit that it is self-evident that when their predecessor, Riley Taylor, settled for the value of the land taken and damages, if any, to his remaining properties, he could not have possibly anticipated the water condition which ultimately developed on the ground which he then owned. Nonetheless, several other features in the evidence submitted to the jury fully substantiate this position.

As previously pointed out on cross-examination of Mr. Eldredge (Tr. 180), the entire project had to be re-designed because the first round of bids were rejected due to costs involved in the underground water condition of the area. Certainly, if the engineers hired by the governmental agencies were unable to accurately predict either the amount of water to be encountered or the cost of taking care of such water condition in the bids for the project, it would hardly seem possible for an ordinary farmer in the area to anticipate this condition which arose.

Of further importance is the testimony of Mr. Charles Sloan, who negotiated the canal acquisition from Mr. Riley Taylor. Mr. Sloan testified (Tr. 124-125) that he and Mr. Taylor went over the land now owned by the Whites, and observed sage brush and foxtail grass in the area (Tr. 126). He made no mention of finding any water condition on any part of this formerly dry and dusty piece of ground; rather, the concern then had by Mr. Taylor was to secure a source of drinking water for his livestock during the dry

summer months (Tr. 128) in lieu of the former water hole which the property had in the northeast corner by the old Plain City canal (Tr. 128-9). Obviously, under all of the circumstances and evidence in this case the jury was amply justified in finding that reasonable minds could not have foreseen the water and alkaline condition which developed on the subject properties.

In a recent California inverse condemnation case it was held that actual physical injury to real property proximately caused by an improvement was compensable under Article I, Section 14, of the California Constitution (substantially identical to the corresponding Utah constitutional provision) " . . . whether foreseeable or not." *Albers v. County of Los Angeles*, 42 Cal. Rptr. 89, 398 P. 2d 129, 137 (1965). In that case the plaintiff was granted an 80 foot right-of-way by deed. Proper construction of the highway triggered a slide which damaged part of the plaintiff's land. The plaintiff was allowed to recover on the basis of inverse condemnation and was said not to have been prejudiced by his granting of the easement.

III.

DEFENDANT WEBER BASIN WATER CONSERVANCY DISTRICT IS A REAL PARTY IN INTEREST IN THIS PROCEEDING.

One of the most prolific generators of legal activity for this Court during the past ten years has been the Weber Basin Water Conservancy District. In the cases which are listed below, all of which involved land acquisition activities by the District in connection with the Weber Basin Project, the District undertook in its own name to acquire properties and pay for severance damages, if any, on the basis that it was the real party in interest in the promotion, construction and operation of the project. In those cases the same issues were substantially presented in the same way that the issues in this case have arisen. In fact, in the *Gailey* case, hereinafter cited, the same general issue arose as to the effect of the operation of the Weber Basin project upon the underground water table of lands located in Morgan County. Of additional interest in that case (328 P. 2d 175) this Court observed that the Weber Basin Water Conservancy District—

> " . . . is engaged in an extensive water conservation program by constructing a series of storage reservoirs along the Weber River."

Also noted by the Court was the fact that these were " . . . *plaintiff's reservoirs* . . . "

Some of the cases are:

Weber Basin Water Conservancy District v. Moore,
2 Utah 2d 254, 272 P. 2d 176 (1954)

Weber Basin Water Conservancy District v. Gailey,
5 Utah 2d 385, 303 P. 2d 271 (1956)
Re-hearing: 8 Utah 2d 55, 328 P. 2d 175 (1958)

Weber Basin Water Conservancy District v. Braegger,
8 Utah 2d 79, 328 P. 2d 730 (1958)

Weber Basin Water Conservancy District v. v. Braegger and Larkin,
8 Utah 2d 346, 334 P. 2d 758 (1959)

Weber Basin Water Conservancy District v. Ward,
10 Utah 2d 29, 347 P. 2d 862 (1959)

Weber Basin Water Conservancy District v. Nelson,
11 Utah 2d 253, 385 P. 2d 91 (1960)

Weber Basin Water Conservancy District v. Hislop,
12 Utah 2d 64, 362 P. 2d 580 (1961)

Maw v. Weber Basin Water Conservancy District,
15 Utah 2d 271, 391 P. 2nd 300 (1964)

Maw v. Weber Basin Water Conservancy District,
20 Utah 2d 195, 436 P. 2d 230 (1968)

In respect of the foregoing cases Weber Basin Water Conservancy District appears as plaintiff to acquire lands necessary to the Weber Basin Project pursuant to the mandate of Rule 17, Utah Rules of Civil Procedure, 1953, which provides:

> "(a) *Real Party in Interest.* Every action shall be prosecuted in the name of the real party in interest; . . . "

In all of the foregoing cases where the Weber Basin Water Conservancy District appears as plaintiff, there is general acknowledgment by the District that it is acquiring land for its own use as part of the Weber Reclamation Project. These reported cases extend from 1954 to 1961. For example, we quote from the District's appellate brief in *Weber Basin Water Conservancy District v. Hislop, supra,* (No. 9317), on page 7:

> "There is no casual (sic) connection insofar as the District is concerned between the condemnation by the District of land which would be inundated by the reservoir, and the relocation of a highway by the State Road Commission, under a contract with the United States. These activities are separate and distinct. *The District was obligated to acquire and pay for lands in the enlarged reservoir site, and the present condemnation case was filed to cary out that responsibility.* The United States and the State Road Commission were obligated to accomplish the road relocation. *Damages flowing from the taking of the reservoir site lands must be paid for by the district* and damages resulting from the road relocation must be paid by the State Road Commission out of the $650,000 provided for that purpose." (Italics added).

However, in 1961 in the case of *Maw v. Weber Basin Water Conservancy District, supra,* the District changed its story to avoid liability. That case was also an inverse condemnation case arising from the activities

of the District. In that case the District contended that the damage was due to federal action and not to its own action. The trial judge concurred in this contention. However, on appeal this Court reversed the trial judge on this very point of real party in interest. On page 273 of the Utah Reporter the trial court's holding is stated:

> " . . . It further concluded that since . . . the relocation was due to federal action and not the fault of either party to the agreement, both parties were excused from performance of the contract. The court also concluded that the Weber Basin Water Conservancy District was not liable to any of the appellants either by way of agreement, estoppel or otherwise for loss of shooting privileges resulting from the purchase of the Maw properties by the United States Government for the Benefit of the Willard Bay Reservoir."

On page 274 of the Utah Reporter this Court held the District liable as the real party in interest on the Weber Basin Reclamation Project.

> " . . . The court erred in dismissing the complaint with prejudice against the Weber Basin Water Conservancy District, for it is clear that in order to avoid condemnation proceedings it agreed to evaluate and pay for any shooting privileges if the construction of the Dam caused their loss. There can be no doubt that the activities in connection with the construction of the Dam did cause such loss. Had not the purchase contract with the United States Government been executed, it would have been necessary to

institute condemnation proceedings. In condemnation proceedings the value of the "shooting privileges" would have been a proper element of damages to be considered by a jury in determining the value of the land taken. The Water Conservancy District merely agreed to do at a later date what it would have been compelled to do sooner had the owners refused to sell the lands for the project."

Again, in this case the District appeared before Judge Norseth at an early stage of the case and contended that it was not the proper party to be sued, claiming that the United States of America was the proper party defendant for the reasons that it supervised and contracted for the building of the subject canal and that it retained title to it. The matter was raised by this defendant in a Motion for Summary Judgment (R. 5), and the matter was extensively briefed (R. 9). After fully considering the matter Judge Norseth ruled against the defendant and denied the Motion for Summary Judgment (R. 10).

Not being content to abide by Judge Norseth's ruling, defendant persisted in raising its defense that the action should have been brought against the United States of America when the matter came up before Judge Wahlquist at pre-trial. Judge Wahlquist ruled that the matter should go to trial before a jury inasmuch as it was his " . . . understanding . . . that the question of who is the beneficial owner of this project is a mixed question of law and fact, . . . ". It was on the basis of this ruling that the jury trial was had.

In the acquisition of the lands for the Willard Pump Canal there was a combination of activity on the part of both the United States of America and the Weber Basin Water Conservancy District. In instances where negotiations could effect a settlement, such as occurred in the Riley Taylor acquisition, a deed was executed directly to the United States of America. However, on one property involving an owner by the name of Porter (Tr. 81), the proposed deed (Exh. E-1) was prepared by and ran to the Weber Basin District. However, when the matter was not terminated by negotiation, suit was brought by the United States of America in Federal District Court to condemn that trict. In another instance involving lands along the canal to the north of the subject properties, the Weber Basin Water Conservancy District acquired title to the lands in its own name.

The fact that the United States of America acquired title directly in some of the negotiated cases should not be given undue weight because of several reasons. In the first place, this was the procedure followed throughout the entire Weber Basin Project, which consisted of several reservoirs, canals and other works in several northern Utah counties. By way of illustration, in the *Radford* case in Ogden Valley (Ex. E-2—Complaint) the action was brought in the name of the Weber Basin Water Conservancy District against several defendants. Coupled with that condemnation action can be shown a typical negotiation contract which would have been

used had condemnation proceedings not been commenced (Exh. E-3), which would have provided for a direct execution of a deed to the Untied States of America (Tr. 83).

So as to get to the heart of the procedure which was used it is necessary to examine the *Repayment Contract* between the Weber Basin Water Conservancy District and the United States of America (Exh. D). The features of this agreement—which from its caption is obviously that of a repayment of a loan—provide specifically for the method of acquisition of lands and the payment of damages as being the obligation of this defendant:

> ACQUISITION OF LANDS AND EASEMENTS
>
> 6. a. The District shall, at its own expense, negotiate for the acquisition of all lands and easements needed by the United States for the construction operation and maintenance of the project works, using for that purpose such forms of contracts, deeds, and other necessary papers as are satisfactory to the Secretary. . . ."
>
> b. In case such needed lands or easements cannot be acquired by agreement, the District shall institute and prosecute to completion the necessary condemnation proceedings for their acquisition, the entire expense of which, including the payment of any award or purchase price, shall be borne by the District with its own funds. Upon acquisition of such lands or easements by condemnation or otherwise, the District shall convey them to the United States upon terms

and conditions and at prices satisfactory to the Secretary, which said prices shall not exceed the actual cost to the District."

Notwithstanding anything that may be argued by defendant, under the applicable contract existing at the time of the purchase from Riley Taylor on August 22, 1961, the foregoing provisions controlled the acquisition of properties for the project. Defendant may contend that the process of acquisition was subject to being changed at or about the same time, but the Court Judgment confirming the Amendatory Contract which embodied the change was not secured until October 2, 1961—more than two months later.

It was held in the case of *State v. Leeson*, 323 P. 2d 692, 84 Ariz. 44 (1958), that the State of Arizona had become liable in inverse condemnation by its participation in a county-federal government project albeit the ultimate interests were in the county and the federal government. The improvement was a road giving access to an air base. The county prepared plans which were approved by the federal government. The federal government provided all but $1,200.00 of the money required by construction; the remainder was paid by the county. The State of Arizona merely called for bids, entered into a construction contract and supervised construction. Flooding caused by a drainage change brought about the inverse condemnation action. The State contended it was merely a middleman between the county and the federal government. While the

court conceded that the ultimate interests were in the county and the federal government the State was nevertheless held liable.

If the State of Arizona was liable in the *Leeson* case then, *a fortiori* Weber Basin Water Conservancy District should be liable in this case. Here the District has participated in land acquisition *and* is the party of ultimate interest.

Likewise, in the case of *Clement v. State Recreation Board,* 35 Cal. 2d 628, 220 P. 2d 897 (1950), the California Supreme Court rejected the contention that participtaion in a flood control project by the federal government relieved the State Recreation Board from liability in an inverse condemnation action by one whose land was flooded.

But the issue of whether the District is a real party in interest in this case goes much deeper than the strict formality of land acquisition outlined above. Of greater importance is the fact that, under the Repayment Contract, it is specifically provided (P .12) that—

"*The District shall have the permanent and exclusive use of all project water . . .* " Further, in conjunction with its right to have the use of the project water the District is obligated (p. 16) to pay in advance, on the basis of annual estimates, the operation and maintenance cost of any of the project works (which includes the Willard Pump Canal) until such time as operation of the particular facility is actually transferred from the United States to the District.

In his opening statement to the jury defendant's counsel stated that his client " . . . is simply buying the water over a period of year" (Tr. 15). In his final argument to the jury (Tr. 279) defendant's counsel further contended that his client is simply " . . . a selling agency for the United St ates." Actually, the position advanced by defendant could hardly be farther from the truth inasmuch as the Repayment Contract provides that the defendant shall pay for the project cost (subject to certain credits) over a period of 60 years (p. 14). After payment has been made the title to the project works which has been retained by the United States is subject to being transferred to the defendant pursuant to an act of Congress.

It is submitted that the retention of naked title to the project works is essentially a means whereby the United States secures its interest in the large sum of money advanced to construct the project works. As pointed out by defendant's witness Kostoff, the total project involves an expenditure of approximately $100,000,000, of which approximately $81,000,000 is to be repaid by the District over the 60 year period (Tr. 250-251).

One of the best tests for determining whether a party involved in a project of this type is a real party in interest is to examine some of its own admissions over a period of time. Of interest in this respect defendant's counsel, on cross-examining Mr. White, made a casual slip-of-the-tongue in making this remark (Tr. 64):

> "In other words, *we built the Willard Canal*—the United States Government built the Willard Canal—over the Plain City Canal and destroyed it."

A more considered statement in this respect can be found in Exhibit E-4, which contains the complaint in an action brought in the same court in Weber County in the matter of Weber Basin Water Conservancy District *v. Tracy-Collins Bank & Trust Company, et al*—Civil No. 4086. There in an action relating to a portion of the Weber Basin Project, over the signature of counsel for this defendant it was alleged in paragraph 3 of the Complaint as follows:

> " . . . and plaintiff is presently engaged in constructing a water project known as The Weber Basin Project."

Further in the same paragraph of the Complaint it was stated that defendant's lands must be acquired—

> " . . . to carry out the plaintiff's purpose to construct the said Weber Basin Project."

The Answer of the propety owners to that Complaint, which was filed by this writer, admitted the foregoing allegations.

The curious aspect of this entire case, when viewed in the light of the entire situation and the Repayment Contract, is that *this defendant would in any event be obligated to eventually pay for the damages sustained by plaintiff's properties.* Under the provisions of the Repayment Contract, the initiation of the proceedings

to condemn the land is by the defendant, with reimbursement being made by the United States at the conclusion of the proceedings. However, the cost of the land acquisition and damages *is included in the amount to be repaid over the* 60 *year period.* The question then naturally arises as to why the defendant is so vigorously trying to extricate itself from liability in this case, and to place it on the United States. The obvious answer is that, because of technical considerations barring a direct suit against the United States or its inclusion in a combination suit, a successful attempt via a court ruling which would shift the liability in this case to the United States would relieve the defendant from its ultimate liability to pay for these damages and any immediate liability of the United States to pay for the damages because the latter can claim immunity from suit. Consequently, the net result is that by this route the defendant in this action would never be required to pay for the damages which under any other circumstances it would not be able to escape.

When the jury found the Weber Basin Water Conservancy District was a real party in interest in this proceeding it had ample evidence to support such finding. Likewise, Judge Norseth had adequate legal and factual bases for denying defendant's motion for Summary Judgment before the case got into Judge Wahlquist's court. The action of the trial judge in setting aside the verdict is unsupportable in this respect.

CONCLUSION

It is respectfully submitted that the Order of Judge Wahlquist in setting aside the jury verdict violates the province of the jury, and is contrary to the preponderance of the evidence in this matter, and is contrary to applicable law. As such, the jury verdict should be re-instated and the matter should be remanded to the Second Judical District Court for further proceedings related to the matter of determining the amount of damages sustained in this case.

Respectfully submitted,

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